In The
SUPREME COURT OF THE UNITED STATES
October Term 1972

No. 72-1115

F. McQUEEN ROZELLE, a single man,

Petitioner,

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, a corporation, and FIRST NATIONAL BANK IN DALLAS, a national banking association,

Respondents.

MEMORANDUM IN LIEU OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTIONS PRESENTED

1. Does a mortgagor in a foreclosure action who has demanded, then waived jury trial, then renewed his demand, have a right to trial by jury?

2. Can a mortgagor implead in the mortgage foreclosure a third party claim against parties who allegedly caused his default of the mortgage?

STATEMENT OF CASE

This action was brought by Connecticut General Life Insurance Company to foreclose its mortgage on approximately 30,000 acres of land in Pushmataha County, Oklahoma. Defendants were the mortgagor, F. McQueen Rozelle, and The First National Bank in Dallas, Texas, the second mortgagee. Each mortgagee sought foreclosure of its mortgage because of default of Mr. Rozelle in failing to make payments when due on notes secured by the respective mortgages.

The mortgagor's attorneys requested the Trial Court to stay the foreclosure proceedings pending trial of a separate, and unrelated lawsuit between Mr. Rozelle and the owners of timber rights on the "Arrowhead" portion of the ranch. These timber rights had been excepted from the mortgages involved, and the mortgagees had requested that any sale be subject to them. The stay was denied. Thereafter, Mr. Rozelle filed a Third-Party Complaint against the timber owners (herein called the Herrons), alleging that the "wrongful" exercise of their timber rights had destroyed his ability to pay the mortgage debts, to his damage. On motion, the Trial Court ordered that the Third-Party Complaint be dismissed.

In his Answer, Mr. Rozelle demanded a jury trial; however, at the pretrial conference it was agreed by all parties, including Mr. Rozelle, that the trial should be by the Judge.

Upon trial of the case, the Court found that Mr. Rozelle had breached the respective mortgages and further found that he

had no defenses, and entered its Decree of Foreclosure.

In due course, the Court ordered the property sold with appraisement by the Marshal because of Mr. Rozelle's failure to redeem the property. The public sale was held January 6, 1971, and Connecticut General was the high bidder by allowing a credit of $825,000 to its judgment. First National Bank moved for and obtained a deficiency judgment for the balance owed it. Connecticut General did not seek a deficiency judgment.

Mr. Rozelle appealed to the Court of Appeals for the Tenth Circuit, in which he asserted a number of alleged errors, including the two asserted in his Petition for Writ of Certiorari pending before this Court. The Tenth Circuit, in a Per Curiam decision, found all of Petitioner's assignments of error to be without merit and affirmed the Trial Court.

Although Mr. Rozelle appears pro se before this Court, as well as the Tenth Circuit, he was represented in the Trial Court by three capable lawyers admitted to practice in Oklahoma, Andrew Wilcoxen of Muskogee, Jack M. Short, formerly of Oklahoma City and now of Tulsa, and James Grigsby of Oklahoma City.

I

PETITIONER WAS NOT ENTITLED TO A JURY TRIAL IN THIS MORTGAGE FORECLOSURE ACTION.

Petitioner's argument that he is entitled to a jury trial in this lawsuit as

a matter of right under the Seventh Amendment to the Constitution for the United States is based upon a theory which distorts the nature of this case. Contrary to Petitioner's argument, this lawsuit did not combine an action to recover money damages for breach of a promissory note with an action of foreclosure. Rather, the only relief requested by either mortgagee was that the court foreclose Petitioner's equity of redemption in the property. To accomplish this, obviously, it was necessary for the court to determine (1) the existence and validity of the mortgages, (2) whether Petitioner was in default under the mortgages because of failure to make timely payments on the notes secured by the mortgages, and (3) the total remaining indebtedness secured by each mortgage. Unless the parties stipulate to the facts, these fact issues exist in each and every mortgage foreclosure action, and their presence does not convert the action from an equitable one to one in which the parties would be entitled to a jury trial.

Petitioner's argument attempts to categorize a necessary element of the foreclosure as a separate claim for relief. This is, of course, his argument that the prayer for a judgment of a set dollar amount is a claim for money damages. His argument ignores the nature of this element and is totally devoid of merit. Mortgage foreclosures in Oklahoma, as in most American jurisdictions, are in practice foreclosures by action and sale as opposed to the common law foreclosure by action, in which the mortgagee foreclosed the mortgagor's equity of redemption in the property and thereby, ipso facto, acquired fee simple absolute title to the property in question. The modern practice, however,

requires a determination of the amount of the indebtedness, a time period in which the mortgagor may redeem the property by paying the indebtedness and thereby avoiding the foreclosure sale, an order of sale at the lapse of said time, and a sheriff's sale. Once the property is sold, regardless of the buyer, the proceeds are then paid into the court (constructively where the mortgagee is the highest bidder and merely credits his bid against his judgment), and then distributed according to the decree of distribution. The modern procedure obviously affords greater protection to the mortgagor because it is possible that the proceeds of the sheriff's sale may exceed the indebtedness. In such event, the balance of the proceeds would be payable to the mortgagor. On the other hand, the proceeds from the sheriff's sale may be less than the debt, in which case the mortgagee may be entitled to a deficiency judgment. Under Oklahoma law there are additional restrictions which exist for the benefit of the mortgagor, specifically the requirement that any deficiency judgment is limited to the difference between the amount owed and the fair and reasonable market value of the property involved as found by the court or the price received at the sheriff's sale, whichever of the two latter figures is the higher. 12 Okla. Stat. sec. 686 (1971); Reconstruction Finance Corp. v. Breeding, 211 F.2d 385 (10th Cir. 1954); U. S. v. Inciardi, 258 F. Supp. 837 (W.D. Okla. 1966). Because of the possibility, indeed almost certainty, that the sale proceeds will be either more or less than the indebtedness, it is a necessary element of every foreclosure action that the court determine the amount of the indebtedness. Consequently, the request by the mortgagees that the court

determine the amount owed each of them as well as their respective priorities, and the court's determination of the same, do not affect the equitable nature of this foreclosure action.

Nor does the possibility that there may be a deficiency judgment ultimately entered by the equity court against the mortgagor convert the equity action into an action at law. Even before the merger of law and equity, a federal court sitting in equity in a foreclosure action had the jurisdiction to enter a deficiency judgment where appropriate. Shepherd v. Pepper, 133 U.S. 626, 651, 33 L.Ed. 706 (1890); Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961).

> "A decree for a deficiency is a necessary incident of a foreclosure suit in equity." Shepherd v. Pepper, 133 U.S. at 651.

Furthermore, the judgment can only be enforced through sale of the property securing the debt. General execution will not lie upon a foreclosure judgment. Only if the property is sold and a deficiency judgment is entered may a general execution be issued, and then only for the amount of the deficiency as established according to the applicable principles of law. Central Union Trust Co. v. Appalachian Corp., 300 F. 397 (D.C. Ga. 1924), aff'd sub nom., West v. Central Union Trust Co., 2 F.2d 585 (CCA 5 1924); Reconstruction Finance Corp. v. Breeding, supra; U. S. v. Inciardi, supra; Riddle v. Gamble, 99 Okla. 161, 226 P. 106 (1924).

Counsel must respectfully take issue with Petitioner's prediction of an "exodus

from state courts to Federal courts" in foreclosure actions if the court applies federal law to the determination of the jury trial issue rather than Oklahoma state law. The distinction between the federal courts and the Oklahoma courts on this issue has always existed, yet there has been no exodus in the past. Nor can one be expected, particularly when there is applicable to foreclosure actions in federal court an impoundment fee to the United States Marshal, although there is no corresponding sheriff's fee where, as in this case, one of the parties bids his judgment against the property. See Hill v. Whitlock Oil Services, Inc., 450 F.2d 170 (10th Cir. 1971). In this particular case, the marshal's fee cost Connecticut General Life Insurance Company $12,390.00.

Even if there were a right to jury trial in this litigation, the Petitioner's trial attorneys waived that right at the pretrial conference. In the findings of fact and conclusions of law made by the trial judge, a copy of which is appended to the Petition for Writ of Certiorari filed herein, Judge Langley noted:

> "Prior to the introduction of evidence the court denied the defendant Rozelle's motion for jury trial, the parties having previously agreed at a pretrial conference that all issues should be tried to the court."

Rule 39(a) of the Federal Rules of Civil Procedure provides that even where there is a timely demand for jury trial the case may be tried to the court alone if the parties "by an oral stipulation made in open court and entered in the record, consent to trial

by the court sitting without a jury". In this case, the stipulation was made by the parties by agreement at the pretrial conference and recorded in the pretrial order executed by Judge Langley and filed in the trial court records of these proceedings. The lack of clarity in the pretrial order is corrected by the trial judge's specific recollection at the trial date that the parties had agreed that the case should be tried to the court alone. Neither Petitioner nor his attorneys of record ever filed a timely exception to the recitation in the pretrial order that the case would be tried to the court alone or to the judge's recollection that there had been an express waiver of jury trial by the parties. Consequently, Petitioner may not impeach the record on appeal. Metropolitan R. Co. v. MacFarland, 195 U.S. 322, 75 S.Ct. 28, 49 L.Ed. 219 (1904); Superior Mfg. Corp. v. Hessler Mfg. Corp., 267 F.2d 302 (10th Cir. 1959), cert. denied, 361 U.S. 876 (1959). The parties having waived jury trial, any attempt by Mr. Rozelle to renew his demand is without effect. General Business Services, Inc. v. Fletcher, 435 F.2d 863 (4th Cir. 1970).

II

THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT PETITIONER TO PURSUE AN UNRELATED TORT CLAIM AGAINST THIRD PARTIES IN THIS FORECLOSURE ACTION.

Although it is not revealed by Petitioner's argument, the attempted "joinder" which he claims was improperly denied him by the Trial Court was nothing other than a tort claim against owners of the severed timber rights, which his attorneys attempted

to implead into this action. As noted in the Per Curiam opinion of the Court of Appeals for the Tenth Circuit, the Third Party Complaint was based on Mr. Rozelle's assertion that "because of the wrongdoing of the Herron trustees in cutting and removing timber, he was unable to develop the land and produce the funds with which to meet his mortgage payments to Connecticut General and the Bank." (Appendix A-1 to the Petition for Writ of Certiorari).

There is absolutely no relationship between Mr. Rozelle's Complaint against the Herrons and the issues involved in the foreclosure of the Respondents' mortgages. Nothing in the mortgages conditioned Rozelle's duty to pay upon harmonious relations between himself and the Herrons. There never has been any dispute but that the "Arrowhead" portion of the ranch was burdened with timber rights in the Herron trustees. The mortgages being foreclosed excepted from their operation these timber rights, and the mortgagees specifically requested that the foreclosure sale be subject to them. Under these circumstances, the Trial Court acted properly in refusing to permit the third party claim. On this matter, it has been noted:

> "Whether third-party defendants may be brought in and retained in the action is ordinarily a matter addressed to the sound discretion of the Trial Judge. If impleading a third-party defendant would require the trial of issues not involved in the controversy between the original parties without serving any convenience, there is no good reason to permit the third-party complaint ... ." United

> States Fidelity & Guaranty Co. v. Perkins, 388 F.2d 771, 773 (10th Cir. 1968), citing Barron and Holtzoff, Federal Practice and Procedure, Vol. 1A, p. 647.

The relief requested by Petitioner would require the Court to convert a mortgage foreclosure into a suit to try the mortgagor's title. In Bilby v. Williams, 116 Okla. 8, 242 P. 1041 (1926), the Oklahoma Supreme Court specifically rejected the notion that the title of the mortgagor is an issue in a mortgage foreclosure action. The Court said:

> "If such a general rule were adhered to, it would undoubtedly have the effect of greatly retarding the progress and development of the state, as no person would care to loan money on real property in this state, if, upon foreclosure proceedings, they were required to perfect and prove title in the grantors at the time they executed the mortgage, ..." Ibid., 116 Okla. at 9, 242 P. at 1042.

Petitioner's attempt to broaden this foreclosure action is contrary to the public policy of the State of Oklahoma, that mortgage lenders be able to protect their investment without undue delay where the mortgagor ceases to pay.

CONCLUSION

Respondent respectfully requests the Court to deny a writ of certiorari.

CHARLES P. GOTWALS, JR.
JOHN KINSLOW